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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

FRANK A. THOMPSON, Trustee for the
ST. LOUIS-SAN FRANCISCO RAIL-
WAY COMPANY, DEBTOR,

Petitioner,

vs.

LOUISE CAMP, Administratrix of the
Estate of ERVIN (IRVING) CAMP,
Deceased,

Respondent.

No. 169

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT
AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
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TO THE HONORABLE, THE CHIEF JUSTICE OF THE
UNITED STATES AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, Frank A. Thompson, Trustee for St. Louis-San Francisco Railway Company, Debtor, was sued in the United States District Court for the Western District of Tennessee by respondent, Louise Camp as administratrix of the estate of her deceased husband, Ervin Camp. The complaint sought a recovery for the wrongful death of Camp under the provisions of the Federal Employer's Liability Act (USCA, Title 45, Sections 51-60) of the damages alleged to have been sustained by the respondent as the widow and by their three minor children (R. 1-8).

The complaint sets forth that Camp was injured on April 26, 1945, through the negligence of petitioner and that a settlement of his claim was made with him by petitioner on June 2, 1945, for the sum of \$500.00 and that subsequently on June 17, 1945, he died as the result of the injuries received on April 26, 1945. The complaint alleged that the settlement was the result of fraud and of mutual mistake of fact and sought to rescind the settlement and at the same time to recover damages for the alleged wrongful death.

The answer of petitioner denied the charges of the complaint and asserted the validity of the release and settlement.

The trial Judge submitted two special issues to the jury, one as to whether the settlement was the result of fraud, and the other as to whether it was the result of mutual mistake of fact, and instructed the jury that if they answered either issue "Yes," they should then proceed to determine the issues of negligence and damages.

The jury answered the issue as to fraud in the negative and the issue as to mutual mistake of fact in the affirmative and returned a verdict against the petitioner in favor of the respondent for \$35,000.00.

The trial Judge approved the jury's verdict on both special issues and approved the general verdict and entered judgment thereon, and overruled petitioner's motion to set aside the jury verdict and for judgment notwithstanding that verdict. He also overruled petitioner's motion for a new trial.

On petitioner's appeal to the Circuit Court of Appeals for the Sixth Circuit that court reversed the case and remanded it for a new trial on the ground that the trial court had erred in failing to give an instruction tendered by petitioner, but refused to dismiss the case and overruled certain other specifications of error made by petitioner. The opinion of the Circuit Court of Appeals appears at Page 604 of the printed record filed on a prior application to this court by each party (Nos. 472 and 517, Oct. Term, 1947) and is reported under the style of *Thompson v. Camp*, 163 F. (2) 396.

Petitions to rehear were filed by each party and denied (Original Record, p. 643). Petitions for writs of certiorari were then filed by each party, that of the respondent being No. 472, October Term 1947, and that of petitioner being No. 517, October Term 1947. Both petitions were denied on February 9, 1948 (68 S. Ct. 458, 68 S. Ct. 459), with directions that the cause be remanded for a new trial. (The record filed in those causes has been filed in this cause and is referred to herein as the "original record").

Thereupon respondent, Louise Camp, administratrix, filed a motion in the Sixth Circuit Court of Appeals to withdraw on remand the issues of the validity of the release and liability and to limit the issues on remand to the question of damages (Supplemental Record, p. ____). This motion was granted by that court in an opinion rendered April 23, 1948 (Supplemental Record, p. ____.) and a petition to rehear was duly filed by petitioner (Supplemental Record, p. ____), and on June 1, 1948 that petition was denied except that it was granted to the extent of striking certain portions of the opinion of April 23, 1948 which might have been construed as withdrawing the issue of contributory negligence (Supplemental Record, p. ____). The opinion as so modified is reported in 167 F. (2) 733.

It is petitioner's position that respondent's motion to limit the issues on remand came too late, coming as it did after this court had denied the petitions for writs of certiorari and that the question should have been raised following the opinion and judgment of the Circuit Court of Appeals for the Sixth Circuit on the original appeal (163 F. [2] 396) since the question, had it been raised at that time, could have been presented to this court by either party along with the other questions presented in the petitions for writs of certiorari and thereby a second application to this court would not have been required.

It is further petitioner's position that in any event the issues presented by the pleadings are so interwoven that it was not proper to limit the issues on remand. The Circuit Court of Appeals for the Sixth Circuit disagreed with your petitioner on both of these questions.

STATEMENT AS TO BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended (28 USCA, Sec. 347). The judgment of the Circuit Court of Appeals was entered April 23, 1948 and a petition for rehearing filed by petitioner was denied by the Circuit Court of Appeals for the Sixth Circuit on June 1, 1948.

QUESTIONS PRESENTED.

I.

In a suit to recover damages under the Employer's Liability Act (45 USCA, Sections 51-60) where there has been a verdict and judgment for the plaintiff, which judgment has been reversed by the Circuit Court of Appeals because of a failure of the trial Judge to give a special request tendered by the defendant with respect to the method of ascertaining damages, and from which judgment of the Circuit Court of Appeals both parties have applied for writs of certiorari to the Supreme Court of the United States, which petitions have been denied, may the Circuit Court of Appeals then entertain a motion by the plaintiff to limit the issues on a new trial of the case or is the plaintiff precluded by her failure to have presented this question following the original decision of the Circuit Court of Appeals so that the action of the Circuit Court of Appeals on such motion might be reviewed by this court without the necessity of a second application?

II.

In a suit by an administratrix under the Employer's Liability Act (45 USCA, Sections 51-60) in which suit the plaintiff alleges a settlement made by her intestate

with the defendant prior to the intestate's death to have been the result of fraud or mutual mistake of fact; and wherein she seeks at the same time to set aside the settlement and release and to recover damages occasioned by the alleged negligence of the defendant; and in which suit there is an advisory verdict by a jury that the settlement was not the result of a fraud, but was the result of mutual mistake of fact and a general verdict for plaintiff on the issues of liability and damages, which verdict was in all things approved by the trial Judge who entered judgment thereon; and in which suit, on defendant's appeal, the judgment is reversed for error in the charge with respect to the method of ascertaining damages, is it proper to limit the issues on a new trial to the issue of damages alone in view of the fact that the issue of damages is necessarily determined by a comparison of negligence and contributory negligence and in view of the fact that the testimony on these issues is not separable, and in view of the further fact that the evidence alleged to support the theory of mutual mistake of fact necessarily included a substantial amount of evidence with respect to the physical condition, illness and suffering of the intestate following the original settlement made with him and prior to his death which evidence also bore on the question of damages?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI.

I.

An important question of procedure in Federal appellate practice is presented by the action of the Circuit Court of Appeals for the Sixth Circuit in entertaining the motion to limit the issues after the petitions for cer-

tiorari were filed and denied by this court particularly since, in order to review the action of the court on such motion, a second petition for certiorari is necessitated by the party adversely affected by the Circuit Court of Appeals' ruling. In so doing the Circuit Court of Appeals has so far disregarded the usual and accepted course of judicial proceedings as to call for the exercise of the supervisory power of this court.

II.

It is believed that the Circuit Court of Appeals for the Sixth Circuit, in limiting the issues on remand, has decided the question in conflict with the controlling principles announced in the decisions of this court and particularly *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 51 S. Ct. 513, 283 U. S. 494.

PRAYER.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals of the Sixth Judicial Circuit, commanding that court to certify and send to this court for review and determination on a day certain to be named therein a full and complete transcript of the record and proceedings in the case entitled and numbered on its docket *Frank A. Thompson, Trustee for the St. Louis-San Francisco Railway Company, Debtor, Defendant-Appellant vs. Louise Camp, Administratrix of the Estate of Irving (Ervin) Camp, Deceased, Plaintiff-Appellee*, No. 10362, to the end that said case may be reviewed and determined as provided in Section 240(a) Judicial Code as amended (28 USCA, Sec. 347), and that the judgment of the Circuit Court of

Appeals for the Sixth Circuit limiting the issues on remand be reversed by this Honorable Court, and that said cause be remanded for a new trial upon all issues presented by the pleadings; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

OPINIONS OF THE LOWER COURTS.

No formal opinion was delivered by the District Court. The order of the District Court overruling petitioner's motion to set aside the verdict and for judgment, or in the alternative for a new trial and entering judgment against petitioner in favor of respondent is found at Original Record Pages 592-593.

The opinion of the Circuit Court of Appeals is found at Page 604 of the original record and is reported under the style of *Thompson v. Camp*, 163 F. (2) 396.

The judgment of the Circuit Court of Appeals is found at Page 603 of the original record.

The judgment of the Court of Appeals overruling the petitions for rehearing filed by both parties is found at Page 643 of the original record.

The opinion of the Circuit Court of Appeals on the respondent's motion to limit the issues on remand was rendered April 23, 1948, and will be found at Page _____ of the supplemental record. The order of the court entered at the same time is found at Page _____ of the supplemental record.

The order of the Circuit Court of Appeals denying petitioner's petition for rehearing was entered June 1, 1948 and will be found at Page _____ of the supplemental record. The opinion of the Circuit Court of Ap-

peals for the Sixth Circuit as modified by that court's action on petitioner's petition for rehearing is reported in 167 F. (2) 733.

JURISDICTION.

A statement of the basis of jurisdiction in this cause is found at Page _____ of the foregoing petition for certiorari.

STATEMENT OF THE CASE.

In addition to the summary statement of matters involved at Page _____ of the foregoing petition for certiorari, a short statement of the facts with respect to Camp's injury and death is appropriate. (References are to the original record.)

Camp, a switchman in the employ of petitioner, was injured on the night of April 26, 1945 while engaged in switching operations in certain yards at Memphis, Tennessee. He was taken to the hospital where his injuries were diagnosed as a concussion of the brain with laceration of the brain tissue resulting in some hemorrhage into the spinal column.

He remained in the hospital until May 9, 1945 at which time he returned to his home, but did not return to his employment. On June 2, 1945, after a visit to the doctor's office, he was told by the doctor that he was "O. K., he could go back to work". (R. 65).

His wife was with him at the time and her testimony is to the effect that Camp was still suffering from headaches and dizzy spells to some extent and that neither she nor Camp agreed with Dr. Hendrix's opinion, but

decided to act on his opinion with the result that Camp contacted the Claim Agent of petitioner on the same day, gave a statement as to how the accident had happened and signed a release settling his claim against petitioner for the sum of \$500.00 which was paid to him at that time.

He returned to work on June 4, 1945 and worked intermittently until June 17, 1945 at which time he fainted while engaged in his employment and located on an engine. He did not recover consciousness and died the next morning. Both the District Court and the Circuit Court of Appeals have concurred in the jury verdict to the effect that his death was the result of his injuries on April 26th.

The release which was signed on June 2, 1945 is as follows:

"Frank A. Thompson, Trustee.
ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY,
DR. GENERAL RELEASE.

"WHEREAS, I, Ervin R. Camp, of 3028 Carnes Avenue, Memphis, Tennessee, was injured on the 26th day of April, 1945, at or near Memphis, Tennessee, on a line of railroad operated or used by Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debter (hereinafter called 'Trustee'), while working as switchman near K. C. Junction I fell, while alighting from a moving cut of cars, under circumstances which I claim render said Trustee liable in damages, although such liability is denied by said Trustee, and, the undersigned being desirous to compromise, adjust and settle the entire matter:

"NOW, THEREFORE, in consideration of the sum of:

"Five Hundred and no/100 DOLLARS (\$500.00) to me this day paid by said Trustee, the receipt of which is hereby acknowledged, I do hereby compromise said claim and do release and forever discharge said Trustee, his successor or successors, agents and employees, from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent, and also do release and discharge them of all suits, actions, causes of action and claims for injuries and damages which I have or might have arising out of the accident above referred to, both to my person and property, as well as from all claims or demands of any kind whatsoever, and do hereby acknowledge full satisfaction of all such liability and causes of action.

"This release is executed by me solely for the consideration above expressed, without any other representation whatsoever, and without any agreement or obligation on the part of said Trustee, his successor or successors, for my future employment.

"I further represent and covenant that at the time of receiving said payment and signing and executing this release, I am of lawful age and legally competent to execute it, and that before signing and executing it I have fully informed myself of its contents and executed it with full knowledge thereof.

"I have read and understand this release.

"Given under my hand and seal this 2nd day of June, A. D. 1945.

(Signed) Ervin R. Camp.

WITNESS:

Mrs. Ervin R. Camp,
Address: 3028 Carnes Aves.,
Memphis, Tenn.

T. R. Kehoe,
Address: 1173 Tutwiler,
Memphis, Tenn.

H. W. Westbrooke."

R. 12, 13, 14.

Mrs. Camp, the respondent, testified as follows with respect to what occurred when she and Camp visited the doctor on June 2nd:

"Q. At the time Mr. Camp signed the release did or not you and Mr. Camp believe he was able to go back to work?

A. No, sir; we didn't. He just felt like he had to because we didn't have any money."

R. 68.

She also testified that Camp was anxious to get back to work as soon as the doctor thought he was able because he had responsibilities. She testified specifically as follows:

"Q. And when this occurred, and when you talked with Dr. Hendrix, Dr. Hendrix said he would be OK, or 'You are OK, go back to work', I believe you said on direct examination, that you did not agree, and Mr. Camp did not agree, that he was all right, and able to go back to work?

A. I didn't. Still, I thought the doctor knew what he was talking about.

Q. So that Dr. Hendrix said 'OK, go back to work,' and you and Mr. Camp did not agree with that, but he went on back to work anyhow?

A. There was nothing else he could do but go back to work."

R. 93, 94.

She also testified that at that time Camp told Dr. Hendrix he was still having headaches and dizzy spells.

R. 92-93.

The medical evidence was to the effect that after injuries such as Camp had received there was no absolute way to tell that he had completely recovered; that in most cases where the subjective and objective symptoms

had quieted down the injuries were cured, but that in some cases there might still be a slight internal hemorrhage, and that if this continued, it would build up a pressure which would finally result in death if it were not promptly recognized and dealt with, and that this was what occurred in Camp's case.

SPECIFICATION OF ERRORS.

I.

The Circuit Court of Appeals for the Sixth Circuit erred in entertaining the respondent's motion for limitation of the issues on remand.

This was erroneous because the motion should have been presented following the original opinion and order of that court on defendant's (the present petitioner) appeal and prior to the application by both parties for writs of certiorari since in that manner only one application for review by this court would have been necessary.

II.

The Circuit Court of Appeals for the Sixth Circuit erred in granting respondent's motion for limitation of issues on remand.

This was erroneous because the issues presented by the pleadings and particularly those of liability and damages were so interwoven and related that it is prejudicial to have some of the issues determined by one jury and the others by another jury.

This is also true with respect to the issue as to whether the release was the result of mutual mistake of fact be-

cause the evidence with respect to this issue bore also on the question of damages.

ARGUMENT.

I.

Was it Proper for the Circuit Court of Appeals to Entertain the Motion to Limit the Issues Filed After Denial of Certiorari Petition by This Court?

The respondent's motion to limit the issues on remand was not filed until after this court had denied petitions for a writ of certiorari filed by each of the parties following the opinion of the Circuit Court of Appeals on the original appeal by your petitioner. The result is that your petitioner is now forced to make a second application to this court for a writ of certiorari to review the action of the Circuit Court of Appeals in granting that motion.

Had respondent filed this motion or otherwise raised the question such as by petition for rehearing following the opinion of the Circuit Court of Appeals, the question could have been disposed of by the court at that time and whichever party may have been aggrieved by the court's action could have presented the matter to this court in the petition for certiorari then filed.

If the procedure adopted by the respondent in this instance is proper, it simply means that matters may be presented from time to time following the action of this court regardless of whether those matters could have been presented on prior hearings. There would never be an end to litigation if this procedure is followed.

For instance, it is conceivable that after the action of this court upon the present petition for certiorari respondent may decide to make some further motion or raise some further question in the Circuit Court of Appeals which could have been made or raised following the original opinion of the Circuit Court of Appeals. The action of the court on such question could not be reviewed without a further petition for certiorari at that time.

In examining many cases dealing with the question as to whether the issues on a new trial should be limited, we have not found any case where this practice has been followed, and we submit that the present procedure is the result of afterthought on the part of respondent and that it was not proper for the Circuit Court of Appeals to entertain the motion as it did.

The principle, of course, is the same as that which has been many times announced by this court and all other courts to the effect that parties are concluded by a judgment not only as to matters presented, but as to any other available matters which might have been presented. *Grubb v. Public Utilities Commission of Ohio*, 50 Sup. Ct. 374, 281 U. S. 470. In that case this court, in discussing a contention that an order was not valid upon a ground not brought to the attention of the State Commission which had made the order subsequently affirmed by the State Court, pointed out that it was a matter which "could have been brought to the attention of the Commission either at that hearing or in his request for a rehearing" and that if the matter was not then given the proper effect, it could have been brought to the attention of the State Court. As this court said, the party was "not at liberty to prosecute that right by piecemeal,

as by presenting a part only of the available grounds and reserving others for another suit, if failing in that." That is what is being done in the present instance. Respondent hoped that her application for certiorari to this court would be granted and the action of the Circuit Court of Appeals in reversing the judgement of the trial court and remanding for a new trial would be reversed and the judgment of the trial court affirmed. Presumably she did not want to weaken her application at that time by suggesting that the Circuit Court of Appeals should limit the issues on remand.

Had she done so at that time, the Circuit Court of Appeals' action, whether it was favorable to respondent or to your petitioner, could have been presented for review to this court by the petition of the aggrieved party. Instead respondent has chosen to prosecute the matter piecemeal by taking her chances on first obtaining a reversal of the action of the Circuit Court of Appeals, and failing that by then seeking a limitation for the issues on a new trial. She claims that this application is made in the interest of expediting and terminating litigation. The same principle required that she make her application for such limitation following the decision of the Circuit Court of Appeals before application was made to this court for writs of certiorari.

II.

If the Motion Was Timely, Was the Action of the Circuit Court of Appeals in Granting It Proper?

Assuming for the purpose of argument that the Circuit Court of Appeals properly entertained the motion of respondent when made, the question is raised as to whether its action in granting the motion was proper.

We recognize, of course, that this court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U. S. 494, 51 S. Ct. 513 held that such practice was not a violation of a party's constitutional rights. The court in that case, however, expressly held that the practice was applicable only where the issues were clearly separable and that the practice might not properly be resorted to unless it clearly appeared that the issue to be retried is so distinct and separable from the other issues that a trial of it alone might be had without injustice. In that case this court held that the question of damages on the counter-claim was so interwoven with the question of liability that it could not be submitted independently of the latter issue without confusion and uncertainty which would amount to a denial of a fair trial.

It is this standard which we believe has been violated by the Circuit Court of Appeals although that court has called attention to the standard in its opinion.

In the present case, in order to determine the issue of damages, it will be necessary to present the same evidence which would be determinative of the issues of negligence and contributory negligence. The Circuit Court of Appeals did not hold, and the question was never presented to that court, that Camp was free from contributory negligence as a matter of law. The jury verdict, regardless of amount, cannot be said to have established the proposition that he was not guilty of contributory negligence. In this situation the amount of damages which the plaintiff might be entitled to recover cannot conceivably be established without establishing whether Camp was guilty of contributory negligence and

without comparing that negligence with the alleged negligence of the defendant.

In this situation it will obviously be unfair to the defendant to tell the jury that they are to find some amount of damages for the plaintiff, but leave to them the comparison of the negligence of the respective parties. Such a situation is bound to produce prejudice and bias on the part of the jury against the defendant and the only way in which it can be avoided is to submit all of those issues to the jury under proper instructions and without regard to any prior determination of any of the issues by another jury.

The same principle is applicable to the issue as to whether the release and settlement were made as the result of mutual mistake of fact. The determination of this issue depended largely upon the testimony of Mrs. Camp, Dr. Hendrix and Mr. Westbrooke, Claim Agent for the defendant. Aside from the actual negotiations and conversations had when the settlement was made and the release signed, all of this testimony would have to be reproduced at a new trial on the issue of damages alone because it dealt primarily with the condition of Camp not only during the period following the signing of the release and prior to his death, but the period following his accident until the settlement was made and he had returned to work. The testimony dealt primarily with his symptoms, the causes thereof, his mental attitude and the knowledge on the part of himself and his wife as well as on the part of the Claim Agent, Westbrooke, of that condition. (Original Record, pp. 57-97; 102; 123; 404-475; 479-512).

There can be no economic justification for limiting the issues on the theory that it would not be necessary to present so much testimony because all of this evidence would have to be produced at a new trial on the issue of damages alone.

On the other hand, it seems reasonably certain that the first jury's determination of the issue of mutual mistake of fact after a consideration of this evidence may have been strongly influenced by its consideration of the same evidence as applied to the issue of damages. The case was one which by its very nature must have aroused a great deal of sympathy on the part of the jury. The Circuit Court of Appeals, in reversing the case because of the court's failure to give petitioner's special request with respect to certain elements to be considered in determining damages, considered that that request was probably prejudicial which necessarily meant that the amount of the verdict was excessive. This, of course, indicates that the jury was unduly sympathetic or prejudiced in favor of the plaintiff. It may have been that this particular jury's idea of the plaintiff's damages materially influenced its determination of the question as to whether the release was valid, that is, whether it had been taken as the result of a mutual mistake of fact, particularly since that mutual mistake of fact related to Camp's physical condition, which also strongly bore on the question of damages.

A reading of the record has convinced us that the testimony of some of the witnesses, particularly that of Dr. Hendrix and Dr. Semmes and Mrs. Camp, can be much more fully developed at a new trial. That testimony dealt, of course, not only with the question of dam-

ages but with the question of whether there was a mutual mistake of fact with respect to Camp's condition. If this testimony is more fully developed, it may result in a different verdict not only with respect to damages but with respect to this issue. This is particularly true of the testimony of Dr. Semmes who testified as an expert with reference to the connection between the original injury and the death of Camp, and is of extreme importance since the record shows that Camp's relatives would not permit an autopsy and the question of the cause of his death was left in doubt as the result of that refusal.

As stated before, there can be little reason from an economic standpoint for limiting the issues on a new trial of this case. Both this court and the Supreme Court of Tennessee in the case of *Perkins v. Brown*, 132 Tenn. 294, 177 S. W. 1158, L. R. A. 1915F. 723, Ann. Cas. 1917A. 124 have pointed out that the reason for the rule is an economic one so as to eventually put an end to litigation thereby saving the costs incident to the relitigation of matters already determined. That is a sound reason in many cases, but in the present case a reading of the record indicates that the testimony of every witness who testified on the original trial will have to be produced again even though the issues are limited to a determination of damages, this being particularly true because of the necessity of comparing negligence or weighing the negligence of Camp against the total negligence of both parties. There can be no saving of costs in this particular case and it seems reasonably certain that in view of the nature of the issues and the evidence applicable to them a limitation of the issues in this particular case will result in an unfair trial rather than in a fair trial and a saving of costs.

CONCLUSION.

It is therefore submitted that because of the important question of appellate practice presented and because of the fact that the Circuit Court of Appeals for the Sixth Circuit has erroneously applied the holdings of this court to the present case the petition should be granted and the erroneous action of the Circuit Court of Appeals for the Sixth Circuit corrected.

Respectfully submitted,

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